

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HOWARD McNEIL

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CIVIL ACTION

v.
EDWARD KLEM

NO. 07-cv-0496

MEMORANDUM AND ORDER

The Antiterrorism and Effective Death Penalty Act of 1996 (commonly known as “AEDPA,” and codified as 28 U.S.C. §§2241-2266) deals with the right of all persons in state custody, or in federal custody, to file a petition in a federal court seeking the issuance of a writ of habeas corpus. If such a writ of habeas corpus is issued by a federal court, the prisoner will be released from either state custody or federal custody (as the case may be) on the grounds that his rights guaranteed by the United States Constitution, and/or by a federal law, and/or by a treaty entered into by the United States, have been violated; habeas corpus motions pursuant to AEDPA are the **only** possible means of obtaining this type of relief. Benchoff v. Colleran, 404 F.3d 812 (3rd Cir. 2005); Okereke v. United States, 307 F.3d 117 (3rd Cir. 2003); Coady v. Vaughn, 251 F.3d 480 (3rd Cir. 2001); United States v. Dorsainvil, 119 F.3d 245 (3rd Cir. 1997).

By means of AEDPA, Congress **intentionally** created a series of **restrictive gate-keeping conditions** which must be satisfied for a prisoner to prevail regarding a petition seeking the issuance of a writ of habeas corpus. One such intentionally restrictive gate-keeping condition is AEDPA’s **strict and short statute of limitations**. Another one of these intentionally restrictive gate-keeping conditions is AEDPA’s so-called **“second or successive rule”** that generally forbids a litigant from filing a habeas if that litigant had a prior habeas that was dismissed with prejudice; for purposes of the law of habeas corpus, dismissal with prejudice encompasses **either**:

1. merits consideration and denial; **or**,

2. dismissal on grounds of procedural default; or,
3. dismissal on grounds of AEDPA's statute of limitations.

Villot v. Varner, 373 F.3d 327 (3d Cir. 2004); Holloway v. Horn, 355 F.3d 707 (3d Cir. 2004); Jones v. Morton, 195 F.3d 153 (3d Cir. 1999); Hull v. Kyler, 190 F.3d 88 (3d Cir. 1999); Christy v. Horn, 115 F.3d 201 (3d Cir. 1997).

In the instant situation, there is a previous 28 USC §2254 petition filed by petitioner (namely 04-cv-0258), which attacked the same conviction and/or sentence attacked in 07-cv-0496, and which was dismissed on grounds of procedural default, which acts as a dismissal with prejudice.

In 07-cv-0496, petitioner bases his grounds for relief not on AEDPA, but on Federal Rule of Civil Procedure 60(b). Petitioner contends that the clerical staff of the state of Pennsylvania is incompetent, and that they mislaid many documents that he mailed them, and that this allegedly resulted in the state not considering his claims, which led to this court's finding of procedural default in 04-cv-0258.

In the context of prisoners, the only way that a Rule 60(b) motion would not be treated as a de facto AEDPA petition is if the Rule 60(b) Motion did not in any way attack the prisoner's conviction and/or sentence with an argument based upon the federal constitution, federal law or federal treaties. Gonzalez v. Crosby, 545 U.S. 524 (2005). An example of such a case where the court could consider such a Rule 60(b) motion is where the previous habeas decision was denied without merits consideration, and the prisoner attacks solely the basis of how that previous non-merits decision was procured without making an argument based upon the federal constitution, federal law or federal treaties (such as attacks on how the previous habeas case was found by the court to be procedurally defaulted, or attacks on how the previous habeas case was found by the court to not be in compliance with the statute of limitations). Gonzalez v. Crosby, 545 U.S. 524 (2005); Pridgen v. Shannon, 380 F.3d 721 (3d Cir. 2004). In this court's view, the instant

case is directly on point with the narrow exception to the general rules of AEDPA and Rule 60(b) carved out by the U.S. Supreme Court in Gonzalez and by the United States Court of Appeals for the Third Circuit in Pridgen. (Petitioner does in the instant matter restate the constitutional arguments made in 04-cv-0258, but the real thrust of his Rule 60(b) petition is that these arguments were not considered because of the state's alleged incompetence).

Accordingly, this _____ day of March, 2007, in accordance with the procedure for the assignment of related cases, it is hereby

ORDERED that the above-captioned case is referred to the Honorable Linda K. Caracappa, United States Magistrate Judge, for a Report and Recommendation, and, it is further

ORDERED that as per Local Civil Rule 72.1.IV(c), all issues and evidence shall be presented to the United States Magistrate Judge, and that new issues and evidence shall not be raised after the filing of the Report and Recommendation if they could have been presented to the United States Magistrate Judge.

BY THE COURT:

S/ CLIFFORD SCOTT GREEN

CLIFFORD SCOTT GREEN
U.S. District Court Judge